

**STATEMENT OF CHAIRMAN LEONARD C. BURCH,
SOUTHERN UTE INDIAN TRIBE,**

BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

REGARDING S. 2065

JULY 18, 2002

Chairman Inouye, Vice-Chairman Campbell, and Members of the Committee:

I am Leonard C. Burch, Chairman of the Southern Ute Indian Tribal Council. Thank you for inviting the Tribe to testify today regarding S. 2065, entitled a bill to implement the intergovernmental agreement between the Southern Ute Indian Tribe and State of Colorado regarding Air Quality Control on the Southern Ute Indian Reservation. It is my pleasure to express the Tribe's support for this important legislation.

In summary, the Southern Ute Indian Tribe strongly supports the bill, and urges that, with the adoption of one amendment to the bill, the Committee approve, and the Senate pass, this important legislation as soon as possible.

Background.

For over ten years, the State, Tribe and United States Environmental Protection Agency (EPA) have disagreed over tribal and State eligibility to receive delegations of authority to administer programs under the Clean Air Act on the Southern Ute Indian Reservation. Under the 1984 law that confirmed the boundaries of the Reservation, the Tribe relinquished territorial jurisdiction over non-Indians conducting activities on non-Indian land. Amendments to the Clean Air Act in 1990, however, authorized EPA to delegate primacy to tribes with respect to administration of various programs under that statute and

arguably restored tribal jurisdictional authority Reservation-wide for air programs. Rather than allow ourselves to become embroiled in bitter and costly litigation that would probably result in a decision unacceptable to all parties, tribal and state governmental officials have formulated a solution supported by all.

Key terms of the agreement.

As encouraged by Congress in the Clean Air Act, the Southern Ute Indian Tribe and the State of Colorado have entered into an intergovernmental agreement concerning air quality control on the Southern Ute Indian Reservation. The Agreement provides for joint participation by the Tribe and the State in the regulation of air quality on the Reservation. Under the Agreement, a joint commission has been created (via subsequently enacted State and tribal law) composed of six (6) members, three (3) of whom are appointed by the Governor and three (3) of whom are appointed by the Tribal Council. The Commission, to be known as the Southern Ute Indian Tribe/State of Colorado Environmental Control Commission, has two main responsibilities. First, the Commission will determine the specific Clean Air Act, or other air programs, that should apply to the Reservation and establish program standards for managing the continued discharge of pollutants. Second, the Commission will review appealable administrative actions. The Tribe will incorporate the standards set by the Commission as part of its application to EPA for delegation of authority to administer Clean Air Act programs on the Reservation. Once the delegation is received, the Tribe will have the responsibility for day-to-day administration and enforcement of the standards, rules and regulations adopted by the Commission. Civil enforcement actions taken by the Tribe will be subject to administrative review by the Commission. It is contemplated that final decisions of the Commission will be subject to judicial review in federal court. The costs associated with the Tribe's administration of the

program and the necessary expenses of the Commission will be funded primarily by permit fees.

As required by the Agreement, a tribal resolution was enacted on January 18, 2000, authorizing the creation of the Commission and approving implementation of the Agreement. Parallel State legislation approving the Agreement was adopted by the Colorado General Assembly and signed by Governor Bill Owens on March 15, 2000. The Agreement gives Congress until December 13, 2002, to adopt federal legislation. If the federal legislation is not enacted before December 13, 2002, the Agreement will become null and void.

Need for S. 2065.

S. 2065 is needed for three reasons. First, without federal legislation, it is unclear who has jurisdictional authority to regulate non-Indian owned sources of air pollution that are located on non-Indian fee land within the Reservation boundaries. Second, implementation of the intergovernmental agreement is conditioned on the passage of federal legislation. And third, S. 2065 is needed to clarify and provide for enforcement authority.

Summary of the terms of S. 2065.

This legislation confirms the authority of EPA to grant the Tribe “treatment as a state” status under the Clean Air Act for such time as the intergovernmental agreement remains in effect. This status will enable the Tribe to administer a single air quality program on all lands with the exterior boundaries of the Southern Ute Indian Reservation, as delegated by the EPA and in accord with the rules promulgated by the Environmental Commission. Additionally, this legislation provides for exclusive federal judicial review of final actions by the Environmental Commission, and authorizes the Tribe or the Environmental Commission, as is appropriate, to file in federal court a petition for declaratory or injunctive relief, or for other orders in

aid of enforcement, where persons have failed to comply with a final civil order of the Tribe or the Environmental Commission made pursuant to the air quality program established under the intergovernmental agreement.

Requested amendment to S. 2065.

Section 4 (b) of the Bill provides that:

Nothing in this Act shall be construed to alter, amend, or modify the right or authority of any person, as defined in section 302(e) of the Clean Air Act (42 U.S.C. 7601(e)), to bring an action under section 304 of such Act (42 U.S.C. 7603).

The section of the Clean Air Act referred to is commonly known as a “citizens suit provision,” which authorizes any person to bring certain civil actions in the federal district courts for enforcement of the Act. For four reasons, the Tribe respectfully requests that the Committee consider amending the bill to delete the citizen suit provision.

First, the Tribe objects to the inclusion of the citizen suit language because it might be construed to be a waiver of tribal sovereign immunity from suit. The citizen suit provision in the Clean Air Act only applies to states to the extent permitted by the Eleventh Amendment to the Constitution. Because states are subject to citizen suit liability only to the extent permitted by the Eleventh Amendment, applying it to the Tribe in this bill would make the requirement more burdensome than it would be for states.

Second, subjecting the Tribe to citizen suits could hinder development of the Tribe’s and State’s Reservation air program because it could add significant resource constraints, financial and otherwise, particularly with respect to potential litigation.

Third, citizen suit recourse is unnecessary since EPA retains the authority to directly enforce the Clean Air Act as well as to withdraw the Tribe’s delegation of authority in the event of non-enforcement.

And fourth, for the reasons noted above, EPA has listed the Clean Air Act's citizen suit provision among those provisions for which it is not appropriate to treat tribes in the same manner as states. See 40 C.F.R. 49.4; 63 Fed. Reg. 7254, 7260 - 61, 7271 (Feb. 12, 1998). The Tribe is concerned, therefore, that without the removal of the citizen suit language, the Southern Ute Indian Tribe might be subject to citizen suit liability in situations where neither states, because of their Eleventh Amendment immunity, nor other tribes, because of EPA's administrative determination, would be subject to such liability.

Therefore, the Tribe objects to the inclusion in the bill of the citizen suit language and respectfully requests that the Committee consider amending the bill to remove that language.

Conclusion.

Resolution of the complex jurisdictional problems present on the Southern Ute Indian Reservation has long been a challenge. Unlike the relationship between many other states and tribes in recent years, the State of Colorado and Southern Ute Indian Tribe have been able to amicably resolve several difficult jurisdictional issues. A spirit of cooperation and a willingness of the State and Tribe to negotiate on a government-to-government basis led to the development of the intergovernmental agreement. S. 2065 is needed to implement and enforce the unique and innovative air pollution control agreement between the Tribe and the State of Colorado. The approval of this bill will allow for the joint participation of the Tribe and State in the regulation of air quality on the Reservation. Such cooperation between an Indian tribe and a State is unprecedented in Indian country. I hope you will support this important legislation so that the agreement can be implemented.

This concludes my statement. I will be happy to answer any questions the Committee may have.

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